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State of Utah v. David J. Orr : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Appellee, vs. DAVID J. ORR, Defendant/Appellant.	Utah Court of Appeals Case No. 20030574-CA Supreme Court Case No. 20041057

BRIEF OF APPELLANT

Appeal from a decision of the Utah Court of Appeals affirming an Order entered by the Honorable Timothy R. Hanson in the Third District Court, Salt Lake County, State of Utah, denying Defendant's Motion to Dismiss and extending Defendant's probation.

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JURISDICTION AND NATURE OF THE PROCEEDING

This is an appeal from a decision of the Utah Court of Appeals upholding an Order of the Honorable Timothy R. Hanson, Third Judicial District Court of Salt Lake County, State of Utah, denying Defendant's Motion to Dismiss an Order to Show Cause and extending Defendant's formal AP&P probation. The Utah Supreme Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2-2(3)(a). The Court of Appeals reversed and remanded on the length of probation ordered (ten years). *State v. Orr*, 2004 UT App 413, Add. 6.

STATEMENT OF THE ISSUES ON APPEAL, STANDARD OF APPELLATE REVIEW AND PRESERVATION BELOW

The Third Judicial District Court of Salt Lake County in and for the State of Utah wrongfully denied Defendant's Motion to Dismiss Order to Show Cause and erroneously ruled the Court had jurisdiction to extend the Defendant's probation for a period of ten years (minus three years previously served on probation). "Whether the trial court had the authority to extend Defendant's probation is a question of law. We accord a trial court's conclusions of law no particular deference, reviewing them for correctness." *State v. Wilcox*, 808 P.2d 1028, 1031 (Utah 1991); *State v. Green*, 757 P.2d 462, 463-4 (Utah 1988). Also, "(b)ecause the interpretation of a statute presents a question of law, we review for correctness." *State v. Amador*, 804 P.2d 1233, 1234 (Utah App. 1990); *State v. Grate*, 947 P.2d 1161, 1164 (Utah App. 1997).

This Court granted a Petition of Certiorari as to the following issues:

> 1. Whether the due process concerns recited in State v. Call, 980 P.2d 201, 203 (Utah 1999) require that a probationer be notified of the State's intent to seek revocation, modification or extension of probation prior to the expiration of the existing probation term.
> 2. Whether the district court made adequate findings, and whether the district court must find a probation violation is willful to impose an extension of probation.

Add. 1.

These issues were preserved in the lower court upon the Defendant's filing of a Motion to Dismiss Order to Show Cause for Lack of Jurisdiction and Memorandum in Support thereof, and oral argument relating to said Motion, as well as the Judge's ruling denying Defendant's Motion (R. 234-378, 481; 386-394, Add. 2).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following are relevant to the issues presented on appeal and are attached as Addendum 3:

- Utah Code Ann. § 77-18-1 (2000)
- U.S. Const. Amend. XIV, § 1
- Utah Const. Art. I, § 7

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition below

Defendant David J. Orr was initially charged with twenty-eight felonies including Securities Fraud, Communications Fraud, Unregistered Securities Agent and Pattern of Unlawful Activity (R. 2-8). On March 23, 2000, Defendant entered a Change of Plea to the

amended charge of Attempted Securities Fraud, a third degree felony (Count 8) and Unlicensed Broker-Dealer or Agent, a third degree felony (Count 20) (R. 20-21). On May 12, 2000, Defendant was sentenced by the Honorable Timothy R. Hanson to two indeterminate terms not to exceed five years in the Utah State Prison to run consecutively. At the same time, the Court suspended the prison terms and placed Defendant on probation for three years to be supervised by the Utah Adult Probation & Parole Department ("AP&P") with numerous conditions, including that Defendant serve six months in the Salt Lake County Jail with no credit for time served, and pay restitution as determined by his probation officer. Defendant was required to pay no less than $1,000.00 per month toward restitution or 25% of his income under the direction of AP&P (R. 22-27).

Defendant performed satisfactorily during his three years (36 months) of probation, but on May 13, 2003, Court records show that an AP&P Progress/Violation Report was filed with the Court (R. 228-229). On May 19, 2003, an Order to Show Cause was entered by the Third District Court (signed on May 13, 2003 by Judge Hanson) alleging that the Defendant had violated the terms and conditions of his probation "by having failed to pay restitution in full, as ordered, in violation of a special condition of the Probation Agreement." (Add. 4 & 5) (R. 230-231, 232-233). On or about May 23, 2003, Defendant filed a Motion to Dismiss Order to Show Cause for Lack of Jurisdiction and a Memorandum in Support thereof (R. 234-378).

The Court held a hearing on June 23, 2003 and denied Defendant's Motion to Dismiss from the Bench (R. 383-384).[1] The Court filed its Memorandum Decision and Order on July 2, 2003 formally denying Defendant's Motion to Dismiss for Lack of Jurisdiction and ruling that the Court had jurisdiction and authority to extend Defendant's probation for a maximum of ten years because the Court had sentenced the Defendant to two 0-5 year terms in the Utah State Prison, and had suspended those terms (Add. 2, R. 386-394). The Court also concluded that it was not required to place the Defendant on a bench probation as argued by the Defendant under the provisions of U.C.A. § 77-18-10(a)(ii)(A) (sic) "because the Defendant's probation did not expire or terminate under § 77-18-10(a)(i) (sic), but was instead tolled under § 77-18-1(11)(b)" (Add. 2, p. 6, R. 391).

Defendant filed a Notice of Appeal from the Court's Decision on July 9, 2003 (R. 395-396). The Utah Court of Appeals issued its Opinion for official publication in Case No. 20030574-CA on November 12, 2004 upholding the trial court's determination that the trial court had properly extended Defendant Orr's probation but reversing and remanding with direction that the trial court amend Orr's probation order to a period of no greater than three years rather than the ten years originally entered. *Orr*, ¶ 16, Add. 6.

This Court granted a Petition of Certiorari as to the following issues:

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[1] The district court apparently combined the hearing on the Defendant's Motion to Dismiss with the Probation Revocation hearing, although Defendant was not asked to admit or deny the allegations in the Order to Show Cause and no evidence was presented as to the Defendant's willful failure to pay restitution. Further the Judge made no specific written findings on the issues raised by Defendant's Motion to Dismiss.

1. Whether the due process concerns recited in State v. Call, 980 P.2d 201, 203 (Utah 1999) require that a probationer be notified of the State's intent to seek revocation, modification or extension of probation prior to the expiration of the existing probation term.

2. Whether the district court made adequate findings, and whether the district court must find a probation violation is willful to impose an extension of probation.

Add. 1.

B. Statement of the Facts

1. Defendant David J. Orr was originally charged with twenty-eight felonies under the securities laws of the State of Utah (R. 2-8).

2. On or about March 23, 2000, Defendant waived preliminary hearing and entered a plea of guilty to Attempted Securities Fraud, a third degree felony (Count 8 amended) and Unlicensed Broker-Dealer or Agent (Count 20) also a third degree felony (R. 20-21).

3. On May 12, 2000, the Defendant appeared before the Honorable Timothy R. Hanson and was sentenced to two terms not to exceed five years in the Utah State Prison with the sentences to run consecutively. The Court suspended the prison terms and placed the Defendant on probation under certain specific conditions, including that the Defendant was required to pay restitution as determined by the Adult Probation & Parole Department. Defendant was required to pay no less than $1,000.00 per month toward his restitution, or 25% of his income, under the direction of the Adult Probation & Parole Department. The Court indicated a restitution hearing could be set upon appropriate application (R. 22-24, 25-29).

4. No report or allegation of probation violation was filed with the court between May 12, 2000 and May 13, 2003, except for the agent's testimony he filed his Progress/Violation Report on May 9, but someone at the court changed the date on the document to May 13. (R. 481, p. 11-14).

5. Court records indicate that on May 13, 2003, a Progress/Violation Report and Affidavit was filed by Probation Officer Robert Egelund requesting that the Court issue an Order to Show Cause requiring Defendant Orr to appear and show cause, if any he has, why his probation should not be revoked and he be committed to the Utah State Prison for the indeterminate term as provided by law, the execution of which had been previously stayed by the Court, "(B)y virtue of his having failed to pay restitution in full, as ordered, in violation of a special condition of the probation agreement." (R. 228-229, Add. 2, 230-231). This was despite the fact that he paid monthly payments faithfully until instructed by his lawyer on May 12, 2003 that his probation terminated by operation of law. (R. 1, p. 32, l. 11-16).

6. The Defendant was served with the Affidavit and Order to Show Cause on May 19, 2003 requiring him to appear before the Court on May 30, 2003 at 9:00 a.m. by Agent Egelund. (Add. 5, p. 2, R. 232-233).

7. Defendant filed a Motion to Dismiss the Order to Show Cause and Memorandum in Support thereof for lack of jurisdiction on or about May 22, 2003 (R. 234-235, 236-378).

8. On or about June 23, 2003, the Court held a hearing regarding Defendant's Motion to Dismiss at which the Defendant was present and represented by his attorney Larry R. Keller and the State was present through its attorney Assistant Salt Lake County District Attorney Howard R. Lemcke, Jr. (R. 383-384).

9. The Court issued its Memorandum Decision and Order on or about July 2, 2003 (Add. 2, R. 386-394).

10. Defendant Orr filed his Notice of Appeal on July 9, 2003 (R. 395-396).

11. The Utah Court of Appeals issued its Memorandum Opinion on November 12, 2004.

12. This Court granted Certiorari on March 30, 2005 (*See* Add. 1).

SUMMARY OF ARGUMENT

It is the position of Defendant that his probation ended by operation of law on May 12, 2003, and the court lost jurisdiction over him at that time because he was not provided notice of the court's action to extend, modify or terminate probation until May 19, 2003. This Court's decisions in *State v. Call*, 980 P.2d 201 (Utah 1999), *State v. Green*, 757 P.2d 462 (Utah 1988), and *Smith v. Cook*, 803 P.2d 788 (Utah 1990) all stand for the proposition that a probationer is entitled to due process of law which requires that the State must take definitive action to extend the term of his probation before the expiration date of the probation and the probationer must be given notice of that intent prior to said expiration date. In Defendant Orr's case, definitive action was not taken until May 13, 2003 and Defendant

intentionally was not notified by his probation officer until May 19, 2003 of the court's intent to take action to extend his probation.

Defendant also contends that the trial court had no authority to extend his probation because it did not enter any finding that he had violated a condition of his probation, let alone any finding that such a violation was willful. Defendant relies on this Court's decision in *Rucker v. Dalton*, 598 P.2d 1336 (Utah 1979) and the Utah Court of Appeals' decision in *State v. Hodges*, 798 P.2d 270 (Utah Ct. App. 1990) for this proposition. Defendant maintains that without a finding of a willful violation of probation, a probationer's probation may not extended, modified or revoked if he has otherwise satisfied his original conditions of probation.

ARGUMENT

POINT I. DEFENDANT'S PROBATION ENDED BY OPERATION OF LAW ON MAY 12, 2003, AND THE COURT LOST JURISDICTION OVER HIM AT THAT TIME, BECAUSE HE WAS NOT PROVIDED NOTICE OF THE COURT'S ACTION UNTIL MAY 19, 2003.

Although there was controversy in the trial court regarding the precise date that documents prepared by AP&P were "filed", there was **no** conflicting evidence regarding the date upon which the Defendant was served with notice of the Order to Show Cause. The Defendant was served on May 19, 2003, at least seven days after his probation should have terminated by operation of law according to the Court's records (Add. 5, p. 2, R. 232, 233). Furthermore, Agent Egelund testified at the hearing in the above-entitled matter that he did

not serve the Defendant until May 19, 2003 because "(T)hat was the soonest I was going to see him." Mr. Egelund admitted that he didn't make any extra effort to notify him of the Order to Show Cause hearing and the possibility that the Court would revoke, extend or modify his probation until May 19th. (R. 481, p. 22, l. 8-20). Furthermore, Agent Egelund admitted that he informed the Defendant prior to May 12, 2003 that his intention was to recommend to Judge Hanson that his probation be terminated and the matter of restitution be handled through the civil process as a judgment (R. 481, p. 22, l. 21-25, p. 23, l. 1-14).

In addition to the foregoing, the Court itself, in making its comments at the Order to Show Cause hearing on June 23, 2003, made the following statement:

> THE COURT: Mr. Keller, when Mr. Egelund came down he says, "Mr. Orr's probation is going to terminate. We don't want to deal with him any more," and I said, "Wrong. I want you to deal with him. I want probation to continue, because he won't pay unless I am holding the prison term over his head," which is evidenced by the fact that he apparently hasn't made the May payment or the June payment.
> (R. 481, p. 30, l. 3-9).

Therefore, the evidence is clear that Defendant was led by his probation officer to believe that the probation officer was going to recommend termination and that his probation would be terminated and he would be required to continue to pay restitution as part of the civil process. It was a shock to Defendant when he was served with the Order to Show Cause on May 19, 2003.

It is the contention of Defendant that his probation ended by operation of law on May 12, 2003, and the Court lost jurisdiction over him at that time, because he was not provided

notice of the Court's action until May 19, 2003. In *State v. Rawlings*, 893 P.2d 1063 (Utah App. 1995), the Utah Court of Appeals held that a trial court lost jurisdiction to initiate probation extension proceedings against the probationer upon expiration of probation. In that case, Defendant had been sentenced on October 11, 1985 after pleading guilty to a single count of attempted sodomy on a child, a first degree felony. Defendant's probation was to expire by operation of law on May 6, 1987 by virtue of his having completed eighteen months on probation. Although the Adult Probation & Parole department generated a memorandum directed to the trial court which suggested extending the Defendant's probation because he needed to continue in treatment, no motion was filed or made by the AP&P agent or prosecutor to extend Defendant's probation. The Court of Appeals there noted that, although the trial court was apparently made aware of the recommendation and a hearing was scheduled, the Defendant received nothing in writing and only learned of the hearing when advised thereof casually by a hospital aid two days before the hearing date. The court then extended Defendant's probation for an additional eighteen months. Id. at 1065.

The Utah Court of Appeals held that "(I)t is well settled that a probationer shall be accorded due process at revocation proceedings because revoking probation seriously deprives a person or his or her liberty." (citations omitted)... Id. at 1067. . Although the Court went on to note that the matter was less clear with regard to probation extension proceedings, "...because of the high risk of prejudice to the probationer when he or she is not given notice of the extension hearing and the hearing is conducted ex-parte, these courts have

invoked their supervisory powers requiring the necessary parties to (1) give the probationer notice of the extension hearing; (2) advise the probationer that he or she has a right to a hearing and/or (3) advise the probationer that he or she has the right to the assistance of counsel." (citations omitted) Id. at 1067.

The Court then specifically ruled: "We hold that a probationer in the State of Utah is accorded a measure of due process at a probation extension proceeding and is thus entitled to the available protections." Id.

In the instant case, Defendant Orr was not notified of any type of action being taken against him until May 19, 2003, seven days after his probation terminated by operation of law.

This issue was elucidated even more clearly by the Utah Court of Appeals in the case of *State v. Grate*, 947 P.2d 1161 (Utah App. 1997). In that case, defendant was sentenced on January 16, 1987 to 1-15 years in prison and was placed on 18 months probation. The Adult Probation & Parole Department filed an Incident Report with the trial court on June 12, 1987 alleging Grate had violated his probation by being arrested for auto burglary. Grate had been arrested on July 8, 1987 on the court's bench warrant based upon the Incident Report and the court noted that Grate's 18-month probation period was due to terminate on July 15, 1988. However, because AP&P did not file its Affidavit in Support of an Order to Show Cause until July 21, 1988 **and Grate was not served with the Order to Show Cause until August 9, 1988** the court ultimately ruled that the trial court had no jurisdiction to

proceed with the Order to Show Cause as defendant's probation had terminated by operation of law on July 15, 1988.

In the *Grate* case, the Court of Appeals stated:

> Under Utah law, it is the notice to a person of the commencement of a judicial enforcement action that distinguishes the filing of an information in a criminal proceeding or the issuance of an OSC in a probation setting, from the filing of an incident report. In each of the former instances, there is no ambiguity as to the State's intention to enforce its rights within a judicial proceeding or the defendant's need to prepare a defense. Furthermore, all the procedural structures which attach to a court proceeding are activated.
>
> In contrast, **the filing of an incident report does not commence a probation revocation proceeding**. *See,* Utah Code Ann. § 64-13-29(1) (1987). Such report need not be served on the probationer, nor does the filing necessarily activate any court proceeding or require the probationer to respond. *See Id.* Indeed, a probationer may never learn about the filing of such a report. . . . rather, **it is only when a probationer is served with an OSC that the probationer receives actual notice of the state's decision to proceed against the probationer for any violations**. . . .
> (Emphasis supplied) 947 P.2d at 1165.

The Court of Appeals found that the critical element involved in the process was notice to the probationer that action was to be taken against him. The court went on to state:

> Most obviously, the notice must inform the probationer of the specific violations the state believes he or she has committed. Equally important, however, is that such notice inform the probationer that he or she *is being* – rather than may at some future date be – called into court to respond to the state's allegations . . .
>
> However, Grate received no notice within his initial probation term of an imminent need to appear in court to respond to those allegations. . . .
>
> **We conclude that a probationer is not charged with a probation violation within § 77-18-1(8)(a) until he or she has received written notice both of the nature of the allegations against him or her and of the pendency of an**

> **enforcement action in the trial court requiring a response.** We further conclude that because Grate was not charged with a probation violation within the original term of his probation, his probation terminated as a matter of law on July 15, 1988, such that the trial court lacked jurisdiction to revoke Grate's probation on August 12, 1988. We therefore reverse the trial court's denial of Grate's 1999 Motion to Correct an Illegal Sentence.
> (Emphasis supplied). 947 P.2d at 1168.

In the *Grate* case, the Court of Appeals analyzed the previous cases of this Court which it believed supported its decision in that case. The Court of Appeals looked at *Smith v. Cook*, 803 P.2d 788 (Utah 1990) and noted that this Court had reviewed a proceeding in which an affidavit supporting an Order to Show Cause was filed within the probationer's term but the Order to Show Cause was not served on the probationer until after that term had expired. The *Grate* court observed ". . . In rejecting the state's argument that filing of the affidavit tolled the running of the probationer's term, the court focused on both 'the nature and degree of notice to which an individual is entitled (under § 77-18-1) prior to a revocation hearing.' *Id.* at 795". 947 P.2d at 1166.

As the *Grate* court noted, this Court in *Smith v. Cook* concluded

> . . . (T)hat the "emphasis on notice . . . is consistent with the assertion that a court retains authority to revoke probation if the probationer is served with notice of the *revocation proceedings* within the probation period" and that the "assertion that a probationer is entitled to notice within the period of probation in order for the court to retain the authority to revoke probation is consistent with the rationale underlying our decision in *Green*." *Cook*, 803 P.2d at 795 (emphasis added). This court later reiterated that proper notice must be "'reasonably calculated under all the circumstances, to apprise interested parties *of the pendency of the action* and afford them an opportunity to present their objections.'" *Rawlings*, 893 P.2d at 1069 (emphasis added) (quoting *Nelson v. Jacobsen*, 669 P.2d 1207, 1212 (Utah 1983) (citation omitted)).
> (Emphasis in original) *Id.* at 1166.

This decision in *State v. Grate* by the Utah Court of Appeals was handed down on October 30, 1997. It should be noted that the tolling statute relied upon by the district court in the instant case, Utah Code Ann. § 77-18-1(11)(b) (1996) (as amended in 1989) was in full force and effect. The Utah Court of Appeals in that case reversed a trial court that had denied Grate's motion (essentially a motion to dismiss the probation revocation proceedings) on the basis that the filing of the Incident Report on June 12, 1987 had tolled the running of Grate's probation under § 77-18-1(11)(b) until the OSC was signed on July 19, 1988. The trial court had rejected Grate's claim that the tolling of the probation period without notice to him had violated his due process rights. As indicated, the Court of Appeals reversed.

The *Grate* court considered this tolling provision of Utah law and determined that it had no force and effect because of the failure of the State of Utah to have served the defendant with the Order to Show Cause until several days after his probation was due to terminate. Because the defendant was denied legal notice, it was a violation of his right to fundamental fairness embodied in the due process clause of the United States Constitution. *See, Grate* at 1163, 1167.[2]

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[2] Although the Utah Court of Appeals ruled in the case of *State v. Reedy*, 937 P.2d 152 (Utah App. 1997) that § 77-18-1(11)(b) (1995) prevented the court from being required to dismiss that particular case for lack of jurisdiction because a violation report was filed with a trial court and a warrant for the defendant's arrest was issued, the court found that the defendant had "made service impracticable since he left Utah without permission and was in California when he claims he should have been served." *Id.* at 153. Because this case was decided several months prior to the *Grate* case, and because it is clear that the defendant had left the jurisdiction and could not be served with the court's proposed action violating his probation, Defendant Orr maintains that this case is

The district court in the instant case relied on this same tolling provision of the Utah Code to deny Defendant Orr's Motion to Dismiss (Add. 4, p. 7, R. 392). It is clear that Defendant Orr was not served with notice of AP&P's Incident Report and the OSC until seven days after his probation ended by operation of law. This and the fact that he was lulled into believing that the Adult Probation & Parole Department and the Court would terminate his probation on May 12, 2003 should be a dispositive factor in this Court's analysis. Defendant's due process rights under both Article I § 12 of the Utah Constitution and the Fifth Amendment to the U.S. Constitution were violated in this circumstance, much the same as defendant Grate's rights were held to have been violated by the Utah Court of Appeals in his situation.

This Honorable Court weighed in on this important constitutional issue in *State v. Call*, 980 P.2d 201 (Utah 1999). This Court reiterated the proposition that:

> (Prior) cases instruct that if it is the intent of the state to extend the probationary period beyond its original term, the state must take definitive action to extend the term **before the expiration date, and the probationer must be given notice of that intent** otherwise the probationer is left in a state of uncertainty, not knowing whether to continue to observe the terms of his probation.
> (Emphasis added). 980 P.2d ¶11 at 203.

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inapposite and does not affect the dismissal requested by him. Reedy's due process rights were essentially waived by his evasion of supervision and leaving the state so he could not be located to be served. No such facts exist in the instant case. If it were otherwise, the *Grate* court surely would have relied on *Reedy* as precedent. *Reedy* was decided April 17, 1997 and *Grate* was decided October 30, 1997. Davis, P.J. sat on both panels.

The court cited its previous cases in *State v. Green*, 757 P.2d 462 (Utah 1988) and *Smith v. Cook*, 803 P.2d 788 (Utah 1990) for this proposition, and clearly indicated in *Call* that this principle was still good law in this State. However, due to the fact that the defendant in *Call* had signed a waiver of personal appearance, and a waiver of his right to a hearing and an agreement to extend his probation for an additional year prior to the date that the probation terminated by operation of law, the court ruled against the defendant in that particular case. Nevertheless, as indicated previously, this court clearly stated that due process requires that the state must take definitive action to extend the term before the expiration date of the probation **and the probationer must be given notice of that intent**. In Defendant Orr's case, definitive action was not taken until May 13, 2003 and Defendant wasn't notified until May 19, 2003 of the Court's action.

Defendant Orr was clearly prejudiced in that he did not make his May or June payments based upon his counsel's advice, thinking his probation had terminated by operation of law and his case would be handled as a civil matter as advised by his probation officer, before the officer saw Judge Hanson on the issue. (*See* R. 1, p. 32, l. 11-16). This put him in jeopardy with the court and could have resulted in his incarceration. (R. 481, p. 39, l. 11-17).

Despite the foregoing, the Court of Appeals in its Memorandum Decision in this matter made light of and passed over this very important constitutional due process requirement. After quoting the applicable language regarding this issue from *State v. Call,*

supra, the Utah Court of Appeals, clearly understanding the decision of this Court in *Call* made the following statement: "We are not convinced that the limited delay between the filing of the AP&P Violation Report on May 9th and Orr's receipt of notice on May 19th creates such problems." *Orr*, ¶ 11 FN. 5.

The very fact that the Utah Court of Appeals in the instant case chose to deal with this very important Utah and United States Constitutional right to due process of law by a mere footnote with a cryptic statement that is difficult to fully understand, shows the result-oriented decision that the Utah Court of Appeals had determined to enter in this matter. There is no analysis nor explanation of any case law or any other principle which suggests that the decisions of this Court in *State v. Call, supra, State v. Green, supra,* and *Smith v. Cook, supra*, not to mention its own decision in *State v. Grate, supra,* should be based solely upon the question of the reasonableness of the time that had elapsed between the termination of the defendant's probation by operation of law, and service of notice on the defendant of the Order to Show Cause regarding the probation violation.

This failure of the Utah Court of Appeals to review and analyze the Defendant's due process rights in light of this Court's cases cited in Defendant's Brief as precedent (and cited herein) as well as its own case precedent establishes clearly that the Court of Appeals decided a question of state law in a way that is in conflict with decisions of this Court when it ruled that Defendant Orr was not entitled to due process of law by receiving notice of the State's intention to extend the probationary period before its termination by operation of law.

POINT II. THE TRIAL COURT HAD NO AUTHORITY TO EXTEND PROBATION BECAUSE IT DID NOT ENTER ANY FINDING THAT DEFENDANT VIOLATED A CONDITION OF HIS PROBATION, LET ALONE ANY FINDING THAT SUCH A VIOLATION WAS WILLFUL.

Under Utah law, "[p]robation may not be **modified or extended** except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation." Utah Code Ann. § 77-18-1(12)(a)(i) (2003) (emphasis supplied). Furthermore, "[p]robation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated." Utah Code Ann. § 77-18-1(12)(a)(ii) (2003). In other words, the sentencing court must reveal both "the evidence relied on and the reasons for revoking probation" in order "to enable a reviewing court to accurately determine the basis for the trial court's decision." *State v. Hodges*, 798 P.2d 270, 274 (Utah Ct. App. 1990); *see also Rucker v. Dalton*, 598 P.2d 1336, 1338-39 (Utah 1979) (noting that the reviewing function of an appellate court is seriously undermined where findings are insufficiently detailed to disclose the steps by which ultimate conclusions are reached—in the context of a civil case, where no liberty interest was at stake). In the instant case, the district court ordered Defendant Orr's probation extended, but entered no "finding that the conditions of probation ha[d] been violated[,]" as required under section 77-18-1(12)(a)(i) or (ii). Therefore, the trial court had no basis for ordering an extension of Defendant Orr's formal probation under Utah Code Ann. § 77-18-1(12)(a)(i).

In the context of an allegation that probation has been violated by a failure to pay restitution, the standards are even stricter. Where the alleged violation is a failure to pay a fine and/or restitution, the sentencing court "must either find that probationer was at fault or that alternatives other than imprisonment are inadequate to meet the state's interests in punishment and deterrence." *See Hodges*, 798 P.2d at 276 (citing *Bearden v. Georgia*, 461 U.S. 660, 662 (1983)). As the *Hodges* court stated, "[w]e believe that ... in order to revoke probation, a violation of a probation condition must, as a general rule, be willful." *Hodges*, 798 P.2d at 276. In the context of an alleged failure to pay restitution (i.e. as grounds for revocation/modification of probation), "a finding of willfulness merely requires a finding that the probationer did not make *bona fide* efforts to meet the conditions of his probation." *State v. Petersen*, 869 P.2d 989, 991 (Utah Ct. App. 1994) (internal quotations, citation omitted; emphasis in original). In the instant case, the district court made no finding that Defendant Orr had violated any term of his probation, let alone that such an alleged violation was willful. Without finding **both** a violation and willfulness (i.e. the absence of bona fide efforts to pay restitution), the district court had no basis for ordering an extension of his probation, even if this Court rules it still had jurisdiction.[3] In fact, as noted previously,

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[3] If this Court chooses to reverse and remand on this issue, it is respectfully requested the Court decide the other issue as well, because once the Court issues findings upon remand, the same issue will need to be appealed again. Judicial economy should dictate this result. "Although resolution of the above issue is dispositive of the present case, where an appellate court finds that it is necessary to remand a case for further proceedings, it has the duty of 'pass[ing] on matters which may then become material.'" *Bair v. Axiom Design, L.L.C.*, 2001 UT 20, ¶12, 20 P.3d 388, 393.

Defendant Orr faithfully made his monthly restitution payments until the date he believed his probation terminated by operation of law, and strictly complied with all other terms of his probation for the entire thirty-six months. He therefore clearly made *bona fide* efforts to meet the conditions of his probation.

POINT III. THIS COURT SHOULD AFFIRM THE DECISION OF THE UTAH COURT OF APPEALS THAT THE DISTRICT COURT EXCEEDED ITS AUTHORITY IN ORDERING PROBATION BEYOND THE STATUTORILY MANDATED TIME FRAME AND STRUCTURE.

This Court did not grant certiorari on the issue raised by Defendant in the Court of Appeals that the district court exceeded its authority in ordering probation beyond the statutorily mandated time frame and structure; and so it is presumed that this Court in its final decision in this case, will simply affirm the Court of Appeals' reversal of the district court in ordering the Defendant on formal probation for ten years and remanding the case to the district court for resentencing in accordance with its Opinion (*See* Add 6, *State v. Orr*, *supra* ¶¶15, 16).

CONCLUSION

Defendant herein respectfully requests that this Court reverse the Utah Court of Appeals and order the matter remanded to the Third District Court for the purpose of entering an Order of Termination of Probation based upon the failure of the trial court to have provided notice to Defendant of its intention to extend his probation until after his probation was scheduled to terminate by operation of law.

Furthermore, if this Court declines to reverse on the issue of due process notice as indicated above, it is respectfully requested that this Court reverse and remand to the district court for the purpose of holding a hearing to determine whether or not Defendant willfully violated any condition of his probation, and instructing the district court that if it cannot so find, Defendant's probation must be terminated. It is requested that the district court be ordered to enter appropriate findings no matter what its determination with regard to the alleged willfulness of Defendant's violation of probation.

Finally, this Court is asked to note in its decision that the finding of the Utah Court of Appeals that the district court had exceeded its jurisdiction by extending Defendant's probation for a period of ten years was improper, is the law of the case and the district court should hold further proceedings, for the purpose of vacating its Order for probation extension for ten years and providing for probation extension as allowed by law.

Dated this 11 day of May, 2005.

COHNE, RAPPAPORT & SEGAL, P.C.

LARRY R. KELLER
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be mailed, by first class U.S. postage prepaid, this 11th day of May, 2005, to:

Laura B. DuPaix
ASSISTANT ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Sharon J. Stevens

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ADDENDUM 1

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,

Respondent,

v.

Case No. 20041057-SC

David J. Orr,

Petitioner.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on December 8, 2004.

IT IS HEREBY ORDERED, pursuant to Rule 45 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted only as to the following issues:

1. Whether the due process concerns recited in State v. Call, 980 P.2d 201, 203 (Utah 1999) require that a probationer be notified of the State's intent to seek revocation, modification, or extension of probation prior to the expiration of the existing probation term.

2. Whether the district court made adequate findings, and whether the district court must find a probation violation is willful to impose an extension of probation.

A briefing schedule will be established hereafter. Pursuant to rule 2, the court suspends the provision of rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

FOR THE COURT:

March 30, 2005
Date

Christine M. Durham
Chief Justice

ADDENDUM 2

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MEMORANDUM DECISION AND ORDER
Plaintiff,	:	CASE NO. 001902772
vs.	:	
DAVID JAY ORR,	:	
Defendant.	:	

This matter came before the Court for hearing on June 23, 2003, in connection with the defendant's Motion to Dismiss Order to Show Cause for Lack of Jurisdiction. The State elicited testimony from Robert Egelund, the defendant's AP&P officer. The Court received into evidence two exhibits, consisting of Mr. Egelund's copies of the Progress/Violation Report and the Affidavit in Support of the Order to Show Cause (both of which were originally filed with the Court).

Following Mr. Egelund's testimony and oral argument from the prosecution and counsel for the defendant, the Court ruled from the bench that the defendant's Motion to Dismiss was denied and that he was to make up the May and June restitution payments. The Court took under advisement the issue of whether the defendant's probation may be extended to the limit or term of the original sentence. The Court also indicated to counsel that a more thorough

discussion of the Court's legal basis for denying the Motion to Dismiss would be included in the Memorandum Decision that the Court would issue. Having now again reviewed the defendant's Motion to Dismiss (the State did not file a response) and having considered counsel's arguments and Mr. Egelund's testimony, the Court rules as stated herein.

LEGAL ANALYSIS

In his Motion to Dismiss, the defendant contends that this Court lacks the jurisdiction to initiate probation extension proceedings against him because these proceedings were not initiated until after probation had already terminated by operation of law. The defendant's argument is based on an erroneous presumption that his probation terminated on May 12, 2003, and that the proceedings were not formally commenced until May 13, 2003, when he considers the Progess/Violation Report to have been filed.

The legal analysis of whether this Court has the jurisdiction to extend the defendant's probation begins with an analysis of when the extension proceedings were initiated in this case and when the defendant's probation would have terminated. As an aside, the Court notes that the defendant takes issue with whether this Court is even permitted to consider an extension of his probation given that the filing of a Progress/Violation Report implies a potential revocation proceeding and possible incarceration. According to the

defendant, such a Report is an inappropriate vehicle for seeking an extension of his probation, even if it had been timely filed.

The Court concludes that the styling of the report is unimportant given that the Court has a wide latitude and flexibility in determining whether probation should be revoked or modified (including the possibility of extending the probationary term). Because it is the Court and not AP&P that fashions these remedies, how AP&P chooses to style the reports that it files with the Court has no import in the Court's ultimate determination of the appropriate remedy. In this case, the Court opts for extending the defendant's probation, as opposed to revoking it altogether. Therefore, the Court will refer to these proceedings as a probation extension proceeding. Having addressed the defendant's argument on this point, the Court proceeds to analyze the timing of the filings that initiated this probation extension proceeding.

Under Utah Code Annotated §77-18-1(11)(b), "[t]he running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court." The first issue therefore becomes when the Progress/Violation Report was filed and whether it tolled the running of the defendant's probation period under §77-18-1(11)(b).

The filing date for the Progress/Violation Report was established by the credible testimony of Mr. Egelund. Mr. Egelund testified that he met with the undersigned on May 9, 2003, and pursuant to that meeting, he returned to the Court on the same date for the purpose of filing the Progress/Violation Report and the Affidavit in Support of Order to Show Cause. Mr. Egelund specifically testified that on May 9, 2003, he brought copies of these documents to the Court, date-stamped them and left them in the intake basket for the Court's clerk. In support of this testimony, Mr. Egelund offered his copies of the Progress/Violation Report and the Affidavit in Support of Order to Show Cause (marked Exhibits 1 and 2). A review of these documents indicates hand-written changes to the May 9, 2003, date-stamp to reflect a date of May 13, 2003. However, the copy of Order to Show Cause attached to the Progress/Violation Report (Exhibit 1) has no such hand-written change. This copy of the Order to Show Cause clearly shows a date-stamp of May 9, 2003. Taking together the documentary evidence before the Court in light of Mr. Egelund's credible testimony, the Court finds that the Progress/Violation Report and the Affidavit were filed on May 9, 2003, but that for reasons that the Court need not delve into, hand-written changes were made to the date-stamp to reflect an apparent date that the documents were docketed. However, the pivotal date under §77-18-1(11)(b) is not the date of

docketing, but rather the date of filing. In this case, this date is easily determined by Mr. Egelund's testimony that he delivered these documents to the Court for filing on May 9, 2003, and that he date-stamped the documents himself with the date of May 9, 2003.

An alternative date for tolling the probationary period is the issuance of an order to show cause. The documents in this case reflect that the Court approved and authorized issuance of the Order to Show Cause on May 12, 2003. Having established the dates of May 9, 2003, or May 12, 2003, as potential dates for tolling the defendant's probationary period, the Court now proceeds to evaluate whether these dates occurred prior to the legislative termination of the defendant's probation.[1]

The defendant was placed on probation by this Court on May 12, 2000. The Court reasons that the first day of probation would have concluded 24 hours after the sentence was imposed or at the close of business on the following day, May 13, 2000. Therefore,

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[1] During oral argument, the State alluded to a statement made by the Court at a February 16, 2001, hearing, as providing the basis for concluding that the Court extended the defendant's probation at that time. Although the Court indicated at that hearing that the defendant's probation would not terminate pending restitution being satisfied, this statement was not intended as a suggestion that probation was extended or that a violation in probation had occurred. For these reasons, the Court does not rely on the February 16, 2001, date in its analysis.

the defendant's probation was set to expire by operation of law on May 13, 2003, the termination date of the defendant's 36-month probationary period. Accordingly, Mr. Egelund's filing of the Progress/Violation Report on May 9, 2003, and this Court's authorization to issue the Order to Show Cause on May 12, 2003, both occurred prior to the legislative termination of the defendant's probation. The defendant's probation period was therefore tolled either on May 9, 2003, or at the latest, May 12, 2003.

The tolling of the defendant's probation period prior to its legislative termination sounds a death knell to two of the defendant's principal arguments. First, the defendant argues that under §77-18-10(a)(ii)(A), this Court can retain jurisdiction over him only under the form of a bench probation. However, this provision never comes into play because the defendant's probation did not expire or terminate under §77-18-10(a)(i), but was instead tolled under §77-18-1(11)(b).

Second, the defendant argues that the due process concerns of State v. Call, 980 P.2d 201 (Utah 1999), have been violated in this case because he was not notified of the State's intent to extend his probation before the expiration of his probation period. Once again, the holding in Call is not applicable to these facts because the defendant's probation did not expire, it was tolled.

Therefore, the service upon the defendant of the Order to Show Cause on May 19, 2003, was within the probationary period and was therefore appropriate under due process considerations.

Based on the foregoing, this Court concludes that it has jurisdiction to extend the defendant's probation because the probation extension proceedings were initiated prior to the legislative termination of the probation period and served to toll the probation period under §77-18-1(11)(b). The defendant's Motion to Dismiss is therefore denied.

Having concluded that the Court has jurisdiction to extend the defendant's probation period, the Court next considers the issue of whether the Court can extend the defendant's probation in 36-month intervals or for the full duration of his remaining 10-year sentence (two terms not to exceed 5 years, to run consecutively). The Court's own legal research has not yielded a case or statute addressing this precise issue. However, distilling the general law on the trial court's discretion in matters of sentencing and probation to its essence provides that while the Court has a large measure of flexibility, it must be exercised "within legislatively established limits." State v. Green, 757 P.2d 462, 464 (Utah 1988). Further, the Court can find no express limitation on the permissible length of probation; only that the probation, together

with any extensions, not exceed the legislatively established sentencing guidelines.

Applying these concepts to this case, the Court concludes that it has the discretion to extend the defendant's probation up to the remaining term of the Court's original sentence (equating to 10 years). The defendant's failure to pay the May and June installments of his restitution underscores the fact that the defendant is induced to repay his victims only when he is in the shadow of probation and the threat of incarceration is held over him. Because the defendant's only incentive to continue making restitution payments is to avoid his probation being revoked, the Court invokes the full scope of its discretion to extend the defendant's probation for the maximum length permissible, the remaining full term of his sentence of 10 years.

This Memorandum Decision will stand as the Order of the Court, denying the defendant's Motion to Dismiss and extending his probation in the manner indicated above.

Dated this 2 day of ~~June~~ July 2003.

TIMOTHY R. HANSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision and Order, to the following, this 2 day of ~~June~~ July 2003:

Howard R. Lemcke, Jr.
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Attorney for Plaintiff
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RS

ADDENDUM 3

CHAPTER 18
THE JUDGMENT

Section	
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77-18-1. Suspension of sentence — Pleas held in abeyance — Probation — Supervision — Presentence investigation — Standards — Confidentiality — Terms and conditions — Termination, revocation, modification, or extension — Hearings — Electronic monitoring.

(1) On a plea of guilty or no contest entered by a defendant in conjunction with a plea in abeyance agreement, the court may hold the plea in abeyance as provided in Title 77, Chapter 2a, Pleas in Abeyance, and under the terms of the plea in abeyance agreement.

(2) (a) On a plea of guilty, guilty and mentally ill, no contest, or conviction of any crime or offense, the court may, after imposing sentence, suspend the execution of the sentence and place the defendant on probation. The court may place the defendant:

(i) on probation under the supervision of the Department of Corrections except in cases of class C misdemeanors or infractions;

(ii) on probation with an agency of local government or with a private organization; or

(iii) on bench probation under the jurisdiction of the sentencing court.

(b) (i) The legal custody of all probationers under the supervision of the department is with the department.

(ii) The legal custody of all probationers under the jurisdiction of the sentencing court is vested as ordered by the court.

(iii) The court has continuing jurisdiction over all probationers.

(3) (a) The department shall establish supervision and presentence investigation standards for all individuals referred to the department. These standards shall be based on:

(i) the type of offense;

(ii) the demand for services;

(iii) the availability of agency resources;

(iv) the public safety; and

(v) other criteria established by the department to determine what level of services shall be provided.

(b) Proposed supervision and investigation standards shall be submitted to the Judicial Council and the Board of Pardons and Parole on an annual basis for review and comment prior to adoption by the department.

(c) The Judicial Council and the department shall establish procedures to implement the supervision and investigation standards.

(d) The Judicial Council and the department shall annually consider modifications to the standards based upon criteria in Subsection (3)(a) and other criteria as they consider appropriate.

(e) The Judicial Council and the department shall annually prepare an impact report and submit it to the appropriate legislative appropriations subcommittee.

(4) Notwithstanding other provisions of law, the department is not required to supervise the probation of persons convicted of class B or C misdemeanors or infractions or to conduct presentence investigation reports on class C misdemeanors or infractions. However, the department may supervise the probation of class B misdemeanants in accordance with department standards.

(5) (a) Prior to the imposition of any sentence, the court may, with the concurrence of the defendant, continue the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence investigation report from the department or information from other sources about the defendant.

(b) The presentence investigation report shall include a victim impact statement according to guidelines set in Section 77-38a-203 describing the effect of the crime on the victim and the victim's family.

(c) The presentence investigation report shall include a specific statement of pecuniary damages, accompanied by a recommendation from the department regarding the payment of restitution with interest by the defendant in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act.

(d) The contents of the presentence investigation report, including any diagnostic evaluation report ordered by the court under Section 76-3-404, are protected and are not available except by court order for purposes of sentencing as provided by rule of the Judicial Council or for use by the department.

(6) (a) The department shall provide the presentence investigation report to the defendant's attorney, or the defendant if not represented by counsel, the prosecutor, and the court for review, three working days prior to

sentencing. Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, shall be brought to the attention of the sentencing judge, and the judge may grant an additional ten working days to resolve the alleged inaccuracies of the report with the department. If after ten working days the inaccuracies cannot be resolved, the court shall make a determination of relevance and accuracy on the record.

(b) If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived.

(7) At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony, evidence, or information shall be presented in open court on record and in the presence of the defendant.

(8) While on probation, and as a condition of probation, the court may require that the defendant:

(a) perform any or all of the following:

(i) pay, in one or several sums, any fine imposed at the time of being placed on probation;

(ii) pay amounts required under Title 77, Chapter 32a, Defense Costs;

(iii) provide for the support of others for whose support he is legally liable;

(iv) participate in available treatment programs;

(v) serve a period of time, not to exceed one year, in a county jail designated by the department, after considering any recommendation by the court as to which jail the court finds most appropriate;

(vi) serve a term of home confinement, which may include the use of electronic monitoring;

(vii) participate in compensatory service restitution programs, including the compensatory service program provided in Section 78-11-20.7;

(viii) pay for the costs of investigation, probation, and treatment services;

(ix) make restitution or reparation to the victim or victims with interest in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act; and

(x) comply with other terms and conditions the court considers appropriate; and

(b) if convicted on or after May 5, 1997:

(i) complete high school classwork and obtain a high school graduation diploma, a GED certificate, or a vocational certificate at the defendant's own expense if the defendant has not received the diploma, GED certificate, or vocational certificate prior to being placed on probation; or

(ii) provide documentation of the inability to obtain one of the items listed in Subsection (8)(b)(i) because of:

(A) a diagnosed learning disability; or

(B) other justified cause.

(9) The department shall collect and disburse the account receivable as defined by Section 76-3-201.1, with interest and any other costs assessed under Section 64-13-21 during:

(a) the parole period and any extension of that period in accordance with Subsection 77-27-6(4); and

(b) the probation period in cases for which the court orders supervised probation and any extension of that period by the department in accordance with Subsection (10).

(10) (a) (i) Probation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, or 12 months in cases of class B or C misdemeanors or infractions.

(ii) (A) If, upon expiration or termination of the probation period under Subsection (10)(a)(i), there remains an unpaid balance upon the account receivable as defined in Section 76-3-201.1, the court may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable.

(B) In accordance with Section 77-18-6, the court shall record in the registry of civil judgments any unpaid balance not already recorded and immediately transfer responsibility to collect the account to the Office of State Debt Collection.

(iii) Upon motion of the Office of State Debt Collection, prosecutor, victim, or upon its own motion, the court may require the defendant to show cause why his failure to pay should not be treated as contempt of court.

(b) (i) The department shall notify the sentencing court, the Office of State Debt Collection, and the prosecuting attorney in writing in advance in all cases when termination of supervised probation will occur by law.

(ii) The notification shall include a probation progress report and complete report of details on outstanding accounts receivable.

(11) (a) (i) Any time served by a probationer outside of confinement after having been charged with a probation violation and prior to a hearing to revoke probation does not constitute service of time toward the total probation term unless the probationer is exonerated at a hearing to revoke the probation.

(ii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of time toward the total probation term unless the probationer is exonerated at the hearing.

(b) The running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court.

(12) (a) (i) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation.

(ii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.

(b) (i) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified.

(ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended.

(c) (i) The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing.

(ii) The defendant shall show good cause for a continuance.

(iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent.

(iv) The order shall also inform the defendant of a right to present evidence.

(d) (i) At the hearing, the defendant shall admit or deny the allegations of the affidavit.

(ii) If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations.

(iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders.

(iv) The defendant may call witnesses, appear and speak in his own behalf, and present evidence.

(e) (i) After the hearing the court shall make findings of fact.

(ii) Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or that the entire probation term commence anew.

(iii) If probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed.

(13) The court may order the defendant to commit himself to the custody of the Division of Substance Abuse and Mental Health for treatment at the Utah State Hospital as a condition of probation or stay of sentence, only after the superintendent of the Utah State Hospital or his designee has certified to the court that:

(a) the defendant is appropriate for and can benefit from treatment at the state hospital;

(b) treatment space at the hospital is available for the defendant; and

(c) persons described in Subsection 62A-15-610(2)(g) are receiving priority for treatment over the defendants described in this Subsection (13).

(14) Presentence investigation reports, including presentence diagnostic evaluations, are classified protected in accordance with Title 63, Chapter 2, Government Records Access and Management Act. Notwithstanding Sections 63-2-403 and 63-2-404, the State Records Committee may not order the disclosure of a presentence investigation report. Except for disclosure at the time of sentencing pursuant to this section, the department may disclose the presentence investigation only when:

(a) ordered by the court pursuant to Subsection 63-2-202(7);

(b) requested by a law enforcement agency or other agency approved by the department for purposes of supervision, confinement, and treatment of the offender;

(c) requested by the Board of Pardons and Parole;

(d) requested by the subject of the presentence investigation report or the subject's authorized representative; or

(e) requested by the victim of the crime discussed in the presentence investigation report or the victim's authorized representative, provided that the disclosure to the victim shall include only information relating to statements or materials provided by the victim, to the circumstances of the crime including statements by the defendant, or to the impact of the crime on the victim or the victim's household.

(15) (a) The court shall consider home confinement as a condition of probation under the supervision of the department, except as provided in Sections 76-3-406 and 76-5-406.5.

(b) The department shall establish procedures and standards for home confinement, including electronic monitoring, for all individuals referred to the department in accordance with Subsection (16).

(16) (a) If the court places the defendant on probation under this section, it may order the defendant to participate in home confinement through the use of electronic monitoring as described in this section until further order of the court.

(b) The electronic monitoring shall alert the department and the appropriate law enforcement unit of the defendant's whereabouts.

(c) The electronic monitoring device shall be used under conditions which require:

(i) the defendant to wear an electronic monitoring device at all times; and

(ii) that a device be placed in the home of the defendant, so that the defendant's compliance with the court's order may be monitored.

(d) If a court orders a defendant to participate in home confinement through electronic monitoring as a condition of probation under this section, it shall:

(i) place the defendant on probation under the supervision of the Department of Corrections;

(ii) order the department to place an electronic monitoring device on the defendant and install electronic monitoring equipment in the residence of the defendant; and

(iii) order the defendant to pay the costs associated with home confinement to the department or the program provider.

(e) The department shall pay the costs of home confinement through electronic monitoring only for those persons who have been determined to be indigent by the court.

(f) The department may provide the electronic monitoring described in this section either directly or by contract with a private provider.

History: C. 1953, 77-18-1, enacted by L. 1980, ch. 15, § 2; 1981, ch. 59, § 2; 1982, ch. 9, § 1; 1983, ch. 47, § 1; 1983, ch. 68, § 1; 1983, ch. 85, § 2; 1984, ch. 20, § 1; 1985, ch. 212, § 17; 1985, ch. 229, § 1; 1987, ch. 114, § 1; 1989, ch. 226, § 1; 1990, ch. 134, § 2; 1991, ch. 66, § 5; 1991, ch. 206, § 6; 1992, ch. 14, § 3; 1993, ch. 82, § 7; 1993, ch. 220, § 3; 1994, ch. 13, § 24; 1994, ch. 198, § 1; 1994, ch. 230, § 1; 1995, ch. 20, § 146; 1995, ch. 117, § 2; 1995, ch. 184, § 1; 1995, ch. 301, § 3; 1995, ch. 337, § 11; 1995, ch. 352, § 6; 1996, ch. 79, § 103; 1997, ch. 302, § 2; 1998, ch. 94, § 10; 1999, ch. 279, § 8; 1999, ch. 287, § 7; 2001, ch. 137, § 1; 2002, ch. 35, § 7; 2002 (5th S.S.), ch. 8, § 137; 2003, ch. 290, § 3.

Amendment Notes. — The 1999 amendment by ch. 279, effective May 3, 1999, substituted references to accounts receivable under § 76-3-201.1 for references to fines, restitution, and other assessed costs under Subsection 76-3-201(4) in Subsections (9) and (10); deleted "upon order of the court" before "shall collect" near the beginning of Subsection (9); added

Amendment XIV. Citizenship; privileges and immunities; due process; equal protection; apportionment of representation; disqualification of officers; public debt; enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

chambeau, 1991, 820 P.2d 920 Criminal Law
⇐ 1030(2)

Sec. 7. [Due process of law]

No person shall be deprived of life, liberty or property, without due process of law.

ADDENDUM 4

FILED

IN THE 3RD DISTRICT - SALT LAKE CITY COURT OF SALT LAKE COUNTY

IN AND FOR THE STATE OF UTAH

REPLY TO REGION III

DEPUTY CLERK

THE STATE OF UTAH

	Plaintiff,	:AFFIDAVIT IN SUPPORT OF
VS		:ORDER TO SHOW CAUSE
ORR, David Jay		:COURT CASE NO: 001902772
	Defendant,	:JUDGE: Timothy R. Hanson
		:DEF ATTY: Larry R. Keller

STATE OF UTAH)
):ss
COUNTY OF SALT LAKE):

ROBERT EGELAND, being duly sworn upon an oath deposes and says that: He is a Probation Officer for the Utah State Department of Corrections; that on the 23rd day of March, 2000, the above-named defendant was adjudged guilty of the crime of Real Estate Broker/Agent With Out License, 3rd Degree Felony; Securities Fraud, 3rd Degree Felony, in the above-entitled Court and on the 12th day of May, 2000, was sentenced to serve a term of 0-5 years in the Utah State Prison; that the execution of the imposed sentence was stayed and the defendant was placed on probation under the supervision of the Department of Corrections; that the above-entitled defendant did violate the terms and conditions of the defendant's probation as follows, to-wit:

MAY 14 [illegible]

RE: ORR, David Jay

1. By having failed to pay restitution in full, as ordered, in violation of a special condition of the Probation Agreement.

WHEREFORE, your affiant prays that an Order from the Court issue directing and requiring the above-named defendant to be and appear before said Court to show cause, if any he/she has, why the aforesaid period of probation should not be revoked, and why said defendant should not be forthwith committed to the Utah State Prison.

ROBERT EGELUND, PROBATION OFFICER

Subscribed and sworn to before me this 9 day of May, 2003.

NOTARY PUBLIC
LINDA L. GOUDREAU
36 W. Fremont Ave.
Salt Lake City, Utah 84101
My Commission Expires
February 2, 2006
STATE OF UTAH

NOTARY PUBLIC

Residing: SLC, Utah

Commission expires: 2-2-06

ADDENDUM 5

IN THE 3RD DISTRICT - SALT LAKE CITY COURT OF SALT LAKE COUNTY

IN AND FOR THE STATE OF UTAH

THE STATE OF UTAH		:
	Plaintiff,	:
VS		:ORDER TO SHOW CAUSE
ORR, David Jay		:COURT CASE NO: 001902772
	Defendant,	:JUDGE: Timothy R. Hanson
		:DEF ATTY: Larry R. Keller

UPON A READING of the Affidavit in Support of Order to Show Cause, the Court finds probable cause to believe that the defendant in this matter has violated the terms and conditions of his/her probation as set forth in the Affidavit, and that revocation or modification of defendant's probation is justified.

IT IS ORDERED that the defendant appear before the Honorable Timothy R. Hanson, Judge of the above-entitled Court, at the Judge's courtroom in SALT LAKE, Utah, on the 30 day of May, 2003 at the hour of 9:00 AM, then and there to show cause why probation of said defendant should not be revoked or modified by the Court based upon the allegations contained in the Affidavit on file with the Court.

The defendant has a right to be represented by counsel at the above-described hearing and to have appointed to represent the defendant if the defendant is indigent. The defendant also has a right to present evidence as provided in the Utah Rules of Civil Procedure.

DATED THIS 13 day of May, 2003

BY THE COURT

Timothy R. Hanson, JUDGE

THIRD DISTRICT COURT SALT LAKE CITY STATE OF UTAH

CERTIFICATE OF SERVICE

I hereby certify that this Order to Show Cause and Affidavit in support thereof, was personally served upon the defendant at SLCo APP 36 W. Fremont SLC, by showing the original and informing the defendant of its contents, and delivering a copy on the 19 day of MAY, 2003; additional copies were delivered to County Attorney's counsel for the defendant, on the 19 day of MAY, 2003

ROBERT EGELUND, PROBATION OFFICER

ADDENDUM 6

IN THE UTAH COURT OF APPEALS

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State of Utah,

Plaintiff and Appellee,

v.

David Jay Orr,

Defendant and Appellant.

OPINION
(For Official Publication)

Case No. 20030574-CA

F I L E D
(November 12, 2004)

2004 UT App 413

Third District, Salt Lake Department

The Honorable Timothy R. Hanson

Attorneys: Larry R. Keller, Salt Lake City, for Appellant

Mark L. Shurtleff and Laura B. Dupaix, Salt Lake City, for Appellee

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Before Judges Jackson, Orme, and Thorne.

THORNE, Judge:

¶1 David Jay Orr appeals the trial court's extension of his probation. Orr argues that the trial court lacked jurisdiction due to the expiration of his original probation period. We affirm all aspects of the trial court's decision except for the length of the extension of Orr's probation.

BACKGROUND

¶2 Orr pleaded guilty to two third degree felonies in connection with alleged fraud and securities violations. On May 12, 2000, the trial court sentenced Orr to two consecutive prison terms of zero-to-five years. The court suspended all but six months of the prison time and placed Orr on thirty-six months probation under the supervision of the Utah Adult Probation and Parole Department (AP&P). The court also ordered Orr to pay $355,504.39 in restitution, with directions that Orr was "to pay no less than $1,000 per month towards restitution, or 25% of [his] income, under direction of AP&P."

¶3 During his probation, Orr made thirty-four monthly payments of approximately $1080. In May 2003, shortly before Orr's probation period was due to expire, AP&P filed a probation violation report stating that Orr had paid only $34,553.20 in restitution. AP&P characterized this as a probation violation and asked the court to order Orr to show cause as to why his probation should not be revoked. The date stamp on the report reflected a filing date of May 9, 2003. The court issued an order to show cause on May 13, and the order was served on Orr on May 19.

¶4 Orr moved to dismiss the order to show cause for lack of jurisdiction. Orr argued that his probation expired by operation of law on May 12, and that to continue his probation AP&P needed to file its report and serve him with notice before that date. Based upon a handwritten adjustment to the date stamp on the violation report, Orr argued that the report had been filed one day late, on May 13. Orr also argued that he had not been served with notice of the alleged violation until May 19. Orr failed to make restitution payments in either May or June 2003.

¶5 On June 23, 2003, the trial court held a hearing to consider Orr's motion to dismiss. AP&P agent Robert Egelund testified that he had filed the report on May 9, 2003. The trial court, relying on Egelund's testimony as well as the date stamp on the report, found that the report was filed on May 9, three days before the expiration of Orr's probation. The court ruled that the timely filing of the

report tolled Orr's probationary period pursuant to Utah Code section 77-18-1(11),[1] and that this tolling provided the court with jurisdiction to extend Orr's probation despite the May 19 service on Orr. See Utah Code Ann. § 77-18-1(11) (2003).

¶6 The trial court then extended Orr's probation for the full ten-year term of Orr's suspended prison sentences.

ISSUES AND STANDARDS OF REVIEW

¶7 Orr challenges the trial court's extension of his probation pursuant to Utah Code section 77-18-1. See Utah Code Ann. § 77-18-1 (2003). "Because the interpretation and application of a statute is a question of law, we review whether the trial court had jurisdiction to extend defendant's probation for correctness." State v. Martin, 1999 UT App 62,¶7, 976 P.2d 1224. Factual findings made by the trial court are "reversed only if clearly erroneous." State v. Wanosik, 2003 UT 46,¶9, 79 P.3d 937 (quotations and citation omitted).

ANALYSIS

I. The Trial Court had Jurisdiction to Extend Orr's Probation

¶8 Orr argues that the trial court lacked jurisdiction to extend his probation because one or more necessary events[2] did not occur prior to the expiration of his original probation term on May 12, 2003.[3] The trial court determined that AP&P filed its violation report on May 9 and that this filing tolled the running of Orr's probation. See Utah Code Ann. § 77-18-1(11) (2003). Accordingly, the trial court found that it had jurisdiction to extend Orr's probation.

¶9 Orr argues that AP&P's probation violation report was filed on May 13, rather than May 9 as found by the trial court. "A trial court's factual findings will not be reversed absent clear error." State v. Widdison, 2001 UT 60,¶60, 28 P.3d 1278.

> To demonstrate that a finding of fact is clearly erroneous, the defendant "must first marshal all the evidence that supports the trial court's findings. After marshaling the supportive evidence, the appellant then must show that, even when viewing the evidence in a light most favorable to the trial court's ruling, the evidence is insufficient to support the trial court's findings."

Id. (quoting State v. Gamblin, 2000 UT 44,¶17 n.2, 1 P.3d 1108) (emphases omitted). Viewing the trial court's decision in the most favorable light, we conclude that it is supported both by the date

stamp on the document and by the testimony of AP&P agent Egelund--testimony that the trial court specifically found to be "credible." We affirm the trial court's factual determination that AP&P filed its violation report on May 9.

¶10 "The running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court." Utah Code Ann. § 77-18-1(11)(b) (2003) (emphases added). Accordingly, the trial court properly found that the May 9 filing of the violation report tolled the expiration of Orr's probation. Orr's original term of probation therefore had not yet expired when he received notice or when the court entered its extension order, and the court had jurisdiction to extend Orr's probation.[4]

II. The Extension of Orr's Probation Had a Sufficient Factual Basis

¶11 Orr next argues that the trial court had no authority to extend his probation because it did not make a specific factual finding that he willfully violated his probation terms. By statute, "[p]robation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation." Utah Code Ann. § 77-18-1(12)(a)(I) (2003) (emphases added). The record before this court adequately reflects the trial court's factual determination that Orr violated the terms of his probation by failing to make complete restitution. It was undisputed that Orr had been ordered to pay over $350,000 in restitution and had actually paid approximately $35,000. The record of Orr's hearing is replete with statements from the trial court indicating the court's acceptance of this factual basis, as is the court's written order.[5] We conclude that the trial court properly found that Orr had violated the conditions of his probation by failing to complete the required restitution.

¶12 Orr argues that even if he did fail to comply with the probation terms, extension of his probation was improper because the trial court made no finding that his probation violation was willful. Willfulness is not an express statutory requirement for either extension or revocation of probation under section 77-18-1(12). However, this court has stated that "to revoke probation, a violation of a probation condition must, as a general rule, be willful." State v. Hodges, 798 P.2d 270, 276 (Utah Ct. App. 1990). Absent a finding of willfulness or fault on the part of the probationer, revocation of probation is appropriate only if a violation is found to "presently threaten the safety of society," id. at 277, or, in the case of failure to make payments of money, if other alternatives to

imprisonment are found to be inadequate to meet the State's interests in punishment and deterrence. See id. at 276; see also Bearden v. Georgia, 461 U.S. 660, 671-72 (1983) (holding that to revoke probation for failure to make money payments the sentencing court must either find that the probationer was at fault or that other alternatives to imprisonment are inadequate).

¶13 Probation revocation necessarily involves the loss of a significantly greater interest--the probationer's liberty--than does the mere extension of probationary status. Indeed, the value of the right to personal liberty appears to have been the underlying basis of the Hodges decision:

> "The right to personal liberty may be as valuable to one convicted of a crime as to one not so convicted, and so long as one complies with the conditions upon which such right is assured by judicial declaration, he may not be deprived of the same. Such right may not be alternatively granted and denied without just cause."

Hodges, 798 P.2d at 276 (quoting State v. Zolantakis, 70 Utah 296, 259 P. 1044, 1046 (1927)). Nevertheless, to the extent that the requirements of Hodges can be applied to the extension of probation, we conclude that the trial court fulfilled those requirements.

¶14 The trial court's extension order stated that "[Orr] is induced to repay his victims only when he is in the shadow of probation and the threat of incarceration is held over him" and that "[Orr's] only incentive to continue making restitution payments is to avoid his probation being revoked." These statements constitute clear findings that "alternatives other than [the extension of Orr's probation] are inadequate to meet the state's interest in punishment and deterrence." Id. No further finding of "just cause" is required. Id.

III. Probation May Be Extended Only in Increments of the Original Probation Term

¶15 Orr argues, and the State concedes, that any extension of probation is limited to a renewal of the original probationary term. We agree. "Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or that the entire probation term commence anew." Utah Code Ann. § 78-18-1(12)(e)(ii) (2003) (emphasis added). Accordingly, the trial court's extension of Orr's probation for ten years, the combined length of his suspended prison terms, was error. The extension of Orr's probation on this occasion should not have exceeded his original probation period of three years.

CONCLUSION

¶16 We conclude that the trial court properly exercised its jurisdiction over Orr when it extended his probation. The trial court erred, however, by extending Orr's probation for a period of time greater than that allowed by Utah Code section 77-18-1. We reverse and remand this matter with directions that the trial court amend Orr's probation order in a manner consistent with this opinion.

_____

William A. Thorne Jr., Judge

¶17 WE CONCUR:

_____

Norman H. Jackson, Judge

_____

Gregory K. Orme, Judge

1. The trial court did not specify which version of Utah Code section 77-18-1 it relied on. For purposes of this matter, section 77-18-1 has not substantively changed since prior to Orr's sentencing, and we will cite to the current version for convenience.

2. These events included AP&P's filing of the violation report, the court's issuance of an order to show cause, and the receipt of notice by Orr.

3. The parties dispute whether Orr's probation term was originally scheduled to expire on May 12 or May 13. Because we conclude that the running of Orr's probation period was tolled on May 9, we do not reach this issue.

4. We note that, in certain circumstances, application of the tolling provision, see Utah Code Ann. § 77-18-1(11)(b) (2003), might implicate the due process concerns expressed in State v. Call, 1999 UT 42,¶11, 980 P.2d 201 ("[I]f it is the intent of the State to extend the probationary period beyond its original term, the State must take definitive action to extend the term before the expiration date, and the probationer must be given notice of that intent.

Otherwise, the probationer is left in a state of uncertainty, not knowing whether to continue to observe the terms of his probation."). We are not convinced that the limited delay between the filing of the AP&P violation report on May 9 and Orr's receipt of notice on May 19 creates such problems.

5. At Orr's hearing, the trial court observed that "[Orr] hasn't paid a nickel on his restitution since he thought probation was over." Additionally, the court's July 2, 2003 order stated:

> [Orr's] failure to pay the May and June installments of his restitution underscores the fact that [Orr] is induced to repay his victims only when he is in the shadow of probation and the threat of incarceration is held over him. [Orr's] only incentive to continue making restitution payments is to avoid his probation being revoked . . . ."

These statements reveal an implicit but clear finding that Orr had not paid the entire restitution amount ordered as a condition of his probation. See State v. Harmon, 956 P.2d 262, 271 (Utah 1998) (upholding trial court's decision based on implicit factual finding regarding jury prejudice).